

Guzman v Principe

2019 NY Slip Op 35125(U)

October 31, 2019

Supreme Court, Bronx County

Docket Number: Index No. 22056/2018E

Judge: John R. Higgitt

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.



SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 14

-----X
GUZMAN, JAILENE

- against -

PRINCIPE, ANDREA M.
-----X

Index No. 22056/2018E

Hon. JOHN R. HIGGITT,
A.J.S.C.

The following papers numbered 13 to 28 in the NYSCEF System were read on this motion for SUMMARY JUDGMENT (LIABILITY), noticed on September 17, 2019 and duly submitted as No. 26 on the Motion Calendar of September 17, 2019

	NYSCEF Doc. Nos.
Notice of Motion – Exhibits and Affidavits Annexed	13-24
Notice of Cross-Motion – Exhibits and Affidavits Annexed	
Answering Affidavit and Exhibits	25-26
Replying Affidavit and Exhibits	27-28
Filed Papers	
Memoranda of Law	
Stipulations	

Upon the foregoing papers, plaintiff’s motion for partial summary judgment on the issue of defendant’s liability for causing the subject accident and for dismissal of defendant’s first affirmative defense of culpable conduct, contributory negligence and assumption of risk, and defendant’s eighth affirmative defense of the emergency doctrine is granted in part, in accordance with the annexed decision and order.

Dated: 10/31/2019

Hon. 
JOHN R. HIGGITT, A.J.S.C.

Check one:

- Case Disposed in Entirety
- Case Still Active

Motion is:

- Granted
- Denied
- GIP
- Other

Check if appropriate:

- Schedule Appearance
- Fiduciary Appointment
- Referee Appointment
- Settle Order
- Submit Order

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 14

-----X
JAILENE GUZMAN,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 22056/2018E

ANDREA M. PRINCIPE,

Defendant.
-----X

John R. Higgitt, J.

Upon plaintiff’s August 26, 2019 notice of motion and the affirmation, affidavit, and exhibits submitted in support thereof; defendant’s August 28, 2019 affirmation in opposition; plaintiff’s August 29, 2019 affirmation in reply; and due deliberation; plaintiff’s motion for partial summary judgment on the issue of defendant’s liability for causing the subject accident and for dismissal of defendant’s first affirmative defense of culpable conduct, contributory negligence and assumption of risk, and defendant’s eighth affirmative defense of the emergency doctrine is granted in part.

This is a negligence action to recover damages for personal injuries plaintiff allegedly sustained in a motor vehicle accident that occurred on March 18, 2017. In support of her motion, plaintiff submitted the pleadings, the police accident report, and the transcripts of the parties’ deposition testimony.

Plaintiff testified that, at the time of the accident, she observed a walk signal in her favor, and that after she checked to make sure that there were no oncoming vehicles, she proceeded to cross the street in the marked crosswalk when she was struck on her left side by defendant’s vehicle.

Defendant testified that she was making a right turn and did not see plaintiff, who was in the crosswalk, until her vehicle made contact with plaintiff. Defendant also testified that at the time of the accident plaintiff was using her cellphone.

Under Vehicle and Traffic Law §1146(a), a driver must exercise due care to avoid colliding with a pedestrian in a roadway. A driver with a green traffic light may proceed forward; however, the driver must yield the right of way to pedestrians that are already within the intersection (*see Kirchgassner v Hernandez*, 40 AD3d 437 [1st Dept 2007]), and the driver has a duty to see what is there to be seen and exercise reasonable care to avoid an accident (*see Vehicle and Traffic Law §1146[a]; Johnson v Phillips*, 261 AD2d 269, 271 [1st Dept 1999]).

Plaintiff made a prima facie showing that defendant violated Vehicle and Traffic Law § 1146 by failing to keep a proper lookout and failing to exercise due care to avoid striking plaintiff.

In opposition to plaintiff's prima facie showing of entitlement to judgment as a matter of law on the issue of her liability, defendant failed to raise a triable issue of fact. Defendant's testimony fails to raise a triable issue of fact as to her liability in causing the accident. Defendant failed to provide a non-negligent explanation for striking a pedestrian with the right of way.

Defendant asserts that a question of fact exists as to whether plaintiff exercised reasonable care in crossing the street. Defendant points to plaintiff's deposition testimony that she was wearing headphones and was waiting for a text, arguing that plaintiff bears comparative fault for the accident. Defendant also asserts that, based on plaintiff's phone records, plaintiff was engaged in a telephone call at the time of the accident.

Viewing the evidence in the light most favorable to defendant (*see Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]), and heeding the principal that summary judgment should be denied if the existence of a triable issue of fact is even arguable (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004]), the parties' deposition testimony coupled with plaintiff's phone records raise a triable issue of fact as to whether plaintiff exercise due care in crossing the intersection (*see Schmidt v S. M. Flickinger Co.*, 88 AD2d 1068 [3rd Dept 1982]). Thus, the aspect of plaintiff's motion seeking dismissal of defendant's first affirmative defense alleging plaintiff's culpable conduct is denied.

However, the aspect of defendant's first affirmative defense alleging assumption of risk is dismissed because the doctrine of assumption of risk has no applicability in this case (*see Trupia v Lake George Cent. School Dist.*, 14 NY3d 392 [2010]).

The aspect of plaintiff's motion seeking dismissal of defendant's eighth affirmative defense of the emergency doctrine is granted. Defendant's testimony demonstrates that defendant was not confronted with an emergency situation at the time the accident occurred.

Accordingly, it is

ORDERED, that the aspect of plaintiff's motion for partial summary judgment on the issue of defendant's liability for causing the subject motor vehicle accident is granted; and it is further

ORDERED, that the aspect of plaintiff's motion seeking dismissal of the aspect of the defendant's first affirmative defense alleging assumption of risk is granted, and that aspect of first affirmative defense is dismissed; and it is further

ORDERED, that the aspect of plaintiff's motion seeking dismissal of defendant's eight affirmative defense alleging the emergency doctrine is granted and that defense is dismissed; and it is further

ORDERED, that plaintiff's motion is otherwise denied.

The parties are reminded of the November 25, 2019 pre-trial conference before the undersigned.

This constitutes the decision and order of the court.

Dated: October 31, 2019



John R. Higgett, A.J.S.C.